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In The

# Supreme Court of the United States

RUSH PRUDENTIAL HMO, INC.,

*Petitioner,*

v.

DEBRA C. MORAN and STATE OF ILLINOIS,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

## BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether a law which is saved from preemption under the terms of the saving clause of the Employee Retirement Income Security Act of 1974 ("ERISA"), ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(B)(2)(A), is nonetheless preempted because it provides a remedy other than those enumerated in ERISA's remedial provision. ERISA § 502, 29 U.S.C. § 1132.

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## INTEREST OF THE *AMICUS CURIAE*

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements.[1] As explained in the Summary of Argument, the resolution of the issue presented in this case is of great importance to United Policyholders and its members because of its potential application to a wide range of laws affecting employees insured through an ERISA plan.

## SUMMARY OF ARGUMENT

The principal argument set forth by petitioner and its supporting *amici* is that Section 4-10 of the Illinois Health Maintenance Organization Act provides a remedy different than those remedies set forth in ERISA Section 502, 29 U.S.C. § 1132. *A fortiori,* they argue, even though the law may be saved from preemption under ERISA's saving clause, the law conflicts with ERISA's exclusive remedies and therefore is preempted under this Court's holding in *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987). They also argue that the subject statute does not even fall within the saving clause and therefore is subject to ERISA's preemption clause.

We anticipate that respondents will thoroughly address their contentions that (1) the Illinois law does fall

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[1] United Policyholders, as *amicus curiae,* has obtained the consent of both the Petitioner and the Respondents to submit this brief. The letters of consent have been lodged with the Clerk of the Court. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than United Policyholders and its members made any monetary contribution to the preparation or submission of this brief.

within the saving clause and (2) that it does not provide an additional remedy, and therefore is not even subject to the *Pilot Life* claim. This brief does not address those questions. We only address the principal question whether ERISA's saving clause defeats a claim that the law is preempted because it provides a remedy other than those set forth in ERISA Section 502.

Petitioner relies almost exclusively upon *Pilot Life*. Yet, this Court has recently pointed out that *Pilot Life* does not address Section 502's impact on laws encompassed by the saving clause. Rather, the issue presented in this action is an open question. *See UNUM Life Insurance Co. of Am. v. Ward*, 526 U.S. 358, 377 n.7 (1999) ("The case therefore does not raise the question whether § 502(a) provides the sole launching ground for an ERISA enforcement action"; *Pilot Life's* holding was "in the context" of a law which was not saved from preemption). Further, in *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25 (1983), this Court clearly held that "[the saving clause] makes clear that Congress did not intend to preempt entirely every state cause of action relating to" ERISA plans.

When one looks at the clear language of ERISA, its legislative history and the language of this Court's decisions, the conclusion is inescapable that ERISA does not preempt state insurance laws, such as Section 4-10 of the Illinois law, merely because they provide remedies other than those set forth in ERISA's Section 502. Further evidence for this conclusion is that ERISA provides that petitioner is not a proper party to this ERISA action. 29 U.S.C. § 1132(d)(2). Rather, ERISA's remedies were designed to address the ability to redress abuses in pension plans, not insurance disputes. Accordingly, under ERISA, an insured, such as Moran, would be limited to an



action against the welfare benefit plan itself. Congress did not intend this result for insurance disputes. It intended that States were free to continue to regulate and provide remedies appropriate to the regulation of insurance and that Moran is therefore free to pursue petitioner on her state-law claim. Moreover, because the claim at issue is saved from preemption, this matter was improperly removed to the federal district court and should be remanded to the State court where the action originated.

United Policyholders further believes that this Court's decision in *Pilot Life* has resulted in great confusion and the denial of appropriate redress to innumerable insureds and that this Court should revisit its holding in *Pilot Life*.

The issue before the Court is of great importance to United Policyholders, which is devoted to protecting the rights of insureds in a wide variety of contexts, including life, health and disability insurance as well as property and liability insurance. There are numerous actual and potential state insurance laws which fall squarely within the saving clause, but whose enforcement has been nullified by courts which have interpreted this Court's precedents as barring any such laws which provide a remedy other than those set forth in ERISA.[2] Thus, the determination in this case of whether ERISA's remedial provisions bar enforcement even of those laws which are explicitly

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[2] *See, e.g., Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 763-64 (5th Cir. 1989); *In Re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194 (8th Cir. 1988); *but see Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144, 151 (2nd Cir. 1995) ("It would be quixotic to rule that a claim under a state statute that is saved from ERISA preemption . . . may nonetheless be enforced only via ERISA provisions and remedies").

saved from preemption has ramifications far beyond the particular law in question here.[3]

An additional concern of United Policyholders is that, in the event this Court does find that the law in question is preempted, that it not foreclose the application of other laws, which are not preempted. In particular, petitioner here claims that Section 4-10 of the Illinois law is merely a substitute procedure for an ERISA participant's right to institute a civil action under Section 502(a)(1)(B). However, other state laws exist which would not be substitutes for, but would be in addition to the claims available under ERISA. These claims may well

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[3] For example, many states provide either a common law remedy against insurers who violate the covenant of good faith and fair dealing where, unlike the state law at issue in *Pilot Life*, the claim is available solely against the insurance industry. *See, e.g., Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal.4th 390, 400, 2 P.3d 1 (2000) ("The availability of [common law] tort remedies in the limited context of an insurer's breach of the covenant advances the social policy of safeguarding an insured in an inferior bargaining position who contracts for calamity protection, not commercial advantage"); *Rogers v. Tecumseh Bank*, 756 P.2d 1223, 1226 (Okla. 1988) ("the implied-in-law duty of good faith and fair dealing [is imposed] on the insurer because of the special purpose for obtaining insurance: An insurer has a special relationship to its insured and has special implied-in-law duties toward the insured"). Additionally, in many States insureds may maintain a private right of action under the state's Unfair Insurance Practices statute. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 312 (1999) (referencing private right of action under Nevada Unfair Insurance Practices Act); Stephen S. Ashley, *Bad Faith Actions: Liability And Damages* § 9:02, at 9-3 through 9-10, & n.38 (2d ed. 1997); *see also Hill v. Blue Cross Blue Shield of Alabama*, 117 F.Supp.2d 1209 (N.D. Ala. 2000) (finding state common law bad faith claim saved and no longer preempted under reasoning of *Ward*, 526 U.S. 358); *Lewis v. Aetna U.S. HealthCare, Inc.*, 78 F.Supp.2d 1202 (N.D. Okla. 1999) (same).



complement rather than conflict with ERISA's remedial scheme. Saving such claims from preemption would permit the insured appropriate relief by being able to pursue both a Section 502(a)(1)(B) action together with other state-law claims which are aimed at the insurance industry.[4]

## ARGUMENT

### I. ERISA'S EXPRESS PREEMPTION CLAUSE CONTROLS OVER ANY CLAIM OF IMPLIED PREEMPTION ARISING OUT OF ERISA SECTION 502.

#### A. Preface

ERISA was enacted as a pension reform bill intended to protect the retirement benefits of workers. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); 29 U.S.C. § 1001(b). Protecting "the continued well-being and security of millions of employees and their dependents" was an express Congressional declaration of policy. 29 U.S.C. § 1001. ERISA comprehensively regulates pension plans. Importantly, ERISA does not comprehensively regulate the terms of non-pension employee benefit plans.[5]

In addition to its substantive provisions, ERISA includes a preemption clause, which provides that, "except as provided in [the saving clause] the provisions of this title . . . shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan. . . . " ERISA § 514(a), 29 U.S.C. § 1144(a). This Court

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[4] *See* note 3, *supra*, and note 46, *infra*.

[5] *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?* 74 Tul. L. Rev. 951 (2000) (hereafter, Bogan, *Protecting Patient Rights*).

has described the preemption clause as "expansive."[6] However, the preemption clause is modified by the saving clause, which declares " . . . nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . . " ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). This saving clause is "phrased with similar breadth" as the preemption clause.[7]

In addition to ERISA's express preemption language, this Court has held that ERISA's comprehensive civil enforcement provisions, detailed in ERISA Section 502, suggest that Congress intended all claims arising from an ERISA-governed employee benefit plan which fall within the ambit of ERISA Section 502 must be pursued exclusively through ERISA.[8] However, this Court has explained that it has not yet determined whether Congress's express exemption from preemption for state laws regulating insurance supersedes any inference of preemption arising from ERISA Section 502 when the state-law remedy at issue provides a remedy aimed specifically at the insurance industry. *Ward*, 526 U.S. at 377.

As the Court approaches this statutory interpretation question, several guiding principles previously established in the Court's ERISA jurisprudence will apply. Like

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[6] *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Pilot Life*, 481 U.S. at 46.

[7] *Ward*, 526 U.S. at 363 ("[P]re-emption is substantially qualified by an 'insurance saving clause,' . . . which broadly [saves state insurance laws]. . . . "); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740-741 (1985) (" . . . [W]hile the general pre-emption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation").

[8] *See Pilot Life*, 481 U.S. 41.



all issues of statutory construction, preemption claims turn on Congress's intent.[9] The Court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[10] Further, the Court must also presume that Congress did not intend to preempt areas of traditional State regulation.[11]

Not only is insurance an area of traditional State regulation, but Congress has specifically designated insurance as a special area of State regulation to be zealously protected from federal regulation. The McCarran-Ferguson Act provides that federal laws shall not be interpreted to supersede state laws regulating the business of insurance. 15 U.S.C. § 1012(b); *Humana, Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). "Congress' 'primary concern' in enacting McCarran-Ferguson was to ensure the States' continued ability to regulate the business of insurance." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 n.21 (1985). And the ERISA saving clause was designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. *Id.*;

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[9] *See Travelers*, 514 U.S. at 655.

[10] *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990), *citing Park'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

[11] *See Travelers*, 514 U.S. at 655 ("We have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress' " (citations omitted)).

*Ward*, 526 U.S. at 375 n.5. Moreover, "[t]here is no discussion in [the legislative] history [of ERISA] of the relationship between the general pre-emption clause and the saving clause, and indeed very little discussion of the saving clause at all." *Metropolitan Life*, 471 U.S. at 745. This Court therefore "decline[d] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself. . . . If a state law 'regulates insurance,' . . . it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause. . . . " *Id.* at 746-47.

Given the unambiguous language of the saving clause and the strong prohibitions against preemption of state insurance laws, the conclusion that a state law that falls within the saving clause is still preempted would require a clear and manifest expression of Congressional intent. Yet, as extensively discussed below, there is nothing in the statutory history of ERISA even to suggest such an intent, let alone a clear and manifest intention.

### B. *Pilot Life* Does Not Control The Question Presented In This Action Because The State Law At Issue In *Pilot Life* Was Not A Law Regulating Insurance.

In *Pilot Life*, this Court held that ERISA preempted a state-law claim for tortious breach of contract arising from an insured ERISA disability benefits plan. The Court found that the state-law claim related to ERISA and was not saved from preemption because the Mississippi law was not aimed specifically at the insurance industry.[12] As

[12] *But cf., Humana*, 525 U.S. 299. This holding in *Pilot Life* appears to be in direct conflict with the Court's later opinion in *Humana* where the Court assumed, without analysis, that the very same law in Nevada – a state common law tort remedy for bad faith breach of an insurance contract – was within the ambit



part of the Court's analysis of the saving clause issue in *Pilot Life*, and in accordance with the views of the Solicitor General, it relied upon the structure and legislative history of the civil enforcement provisions contained in ERISA Section 502 to bolster its conclusion that Congress intended ERISA to preempt the state-law remedy at issue in that action. *Pilot Life*, 481 U.S. at 51-52.

Critically, the reasoning of the Court applied only to laws of general application and does not logically extend to laws that fall within the saving clause. Further, in the recent case of *Ward*, 526 U.S. 358, 377 n.7, the Solicitor General specifically pointed out that the Section 502 implied preemption analysis it presented in *Pilot Life* would not apply in a case where the state-law remedy at issue was a state law regulating insurance. The limited application of *Pilot Life's* Section 502 implied preemption analysis is reflected in the Court's final sentence: " . . . [W]e conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by [the saving clause] *and therefore* is pre-empted by [the preemption clause]." *Pilot Life*, 481 U.S. at 57 (emphasis added).

In noting that ERISA's remedies were intended to be exclusive, the *Pilot Life* Court relied on two factors: (1) the structure of ERISA itself and (2) reference in the legislative history of ERISA to the preemptive scope of Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Regarding the structure of ERISA, the Court held that the ERISA remedies represented a comprehensive enforcement scheme, which, in light of ERISA's broad preemption clause, was intended to be exclusive. The Court determined that parties were

of the McCarran-Ferguson Act. *Id.* at 311-313. *See* discussion in text at Section D, *infra*.

not "free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life*, 481 U.S. at 54.

While this conclusion can be applied to generally applicable state-law remedies, such as was before the Court in *Pilot Life*, or more importantly, to laws affecting pension benefits, the same is not true of laws which fall within the specific Congressionally-carved exception, which saves laws regulating insurance. Congress did not "reject" remedies specifically provided for within the confines of the saving clause. On the contrary, such laws were specifically saved, not rejected. Further, the saving clause is fundamental to the structure of the Act. It provides that " . . . *nothing* in this subchapter shall be construed to exempt or relieve any person from *any* law of any State which regulates insurance. . . . " 29 U.S.C. § 1144(b)(2)(A). Not only are the remedies contained in the same subchapter as the saving clause (remedies in 29 U.S.C. § 1132, saving clause in 29 U.S.C. § 1144), but the saving clause is in the very same statute as the preemption clause (29 U.S.C. § 1144). As such, the structure of ERISA cannot serve as the clear and manifest intent of Congress required to override the clear terms of the saving clause itself and, as set forth at length below, there is nothing in the legislative history of the Act to support such a conclusion. Thus, it is illogical to transfer this Court's discussion of the structure of ERISA in *Pilot Life* to the entirely different context of a law that the very structure of the Act provides is "saved" from preemption.

The second claimed factor supporting the *Pilot Life* conclusion is that the Conference Report contained reference to the LMRA. 481 U.S. at 55. The *Pilot Life* Court determined that this statement reflected Congress' intent to compare ERISA's preemptive effect with the powerful preemptive force of Section 301 of the LMRA. *Id.* Once again, this may apply with regard to laws of general



applicability or laws relating to pension benefits; however, it has no bearing with respect to a law that falls within the saving clause. The LMRA has no saving clause and thus is not comparable legislation when addressing a law that is specifically saved from preemption. Indeed, this Court has made this very point.

This Court has repeatedly pointed out that the saving clause is just as broad as the preemption clause. *Ward*, 526 U.S. at 363; *Metropolitan Life*, 471 U.S. at 733. Thus, the remedial clause cannot serve to trump the saving clause simply because of reference in the legislative history to the LMRA.

> The phrasing of § 502 [ERISA's remedial provision] is instructive. It does not purport to reach every question relating to plans covered by ERISA . . . *Furthermore, § 514(b)(2)(A) of ERISA [the saving clause] makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans.* With important, but express limitations, it states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." *In contrast*, § 301 (a) of the LMRA applies to all "suits for violation of contracts between an employer and a labor organization representing employees in an industry effecting commerce . . . or between any such organizations."

*Franchise Tax Board v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25 (1983) (emphasis added).

Even the *Pilot Life* decision makes this clear. In citing to the legislative history, the Court quoted one of the bill's sponsors, Senator Williams as follows: *"[W]ith the narrow exceptions specified in the bill*, the substantive and enforcement provisions of the conference substitute are intended to preempt the field. . . . " 481 U.S. at 46

(emphasis added). Manifestly, the saving clause is the principal exception.[13] Moreover, Senator Williams' statement, as well as those of the other sponsors of the bill,[14] were made in the context of the intended purpose of the Act. ERISA was intended as pension reform legislation. It did not intend to deal with or replace state laws regulating insurance. ERISA is silent with regard to any meaningful regulation of insurers. Instead, it saves to the States the continuing responsibility to regulate insurers.

Field preemption "strips the states of all regulatory authority in the defined field and is normally inferred by the courts only when Congress has comprehensively regulated the subject area or when the subject is peculiarly with the federal domain."[15] Yet, ERISA's comprehensive regulations are entirely directed at pension benefits, and insurance is a field in which regulation is traditionally left to the states. Bogan, *Protecting Patient Rights, supra* note 15, 74 Tul. L. Rev. at 974-75. Thus, to imply a Congressional intent to preempt the field of nonpension benefits is to void all state regulation, while failing to replace it with any federal regulation, let alone comprehensive federal regulation. It is apparent that the very purpose of the saving clause was to avoid such a regulatory void by

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[13] Reference in Senator Williams' remarks to the "narrow" exception is "far too frail [to] support" a restricted reading of the saving clause. *Metropolitan Life*, 471 U.S. at 746.

[14] Further, while these comments were persuasive to this Court in the context of a law of general application, they are "of little help in analyzing § 514(b)(2)(A) for . . . the saving clause is broad on its face and specific in its reference." *Metropolitan Life*, 471 U.S. at 746 n.24.

[15] Bogan, *Protecting Patient Rights, supra*, at 956; *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983).



saving the entire field of state insurance regulation, for which ERISA provides no meaningful substitute.

It makes little sense for Congress to have supplanted an entire field of traditional state regulation and replace it with virtually nothing. Similarly, it makes little sense to have specifically saved state insurance laws and then strip the States of their ability to enforce their state laws by limiting the remedies only to those specifically drafted for the unrelated field of pension benefits. While petitioner repeatedly asserts that ERISA was intended to provide uniformity and that an expansive application of the saving clause would "swallow ERISA whole", Pet'r Br. at 36, this Court has already rejected such claims. "We recognize that applying the States' varying insurance regulations creates disuniformities for 'national plans that enter into local markets to purchase insurance.' [citation] As we have observed, however, '[s]uch disuniformities . . . are the inevitable result of the congressional decision to "save" local insurance regulation.' " *Ward*, 526 U.S. at 376 n.6.

Thus, the two reasons upon which this Court derived its exclusive remedy discussion in *Pilot Life* have no applicability to state insurance laws which are not only saved from preemption, but which Congress in the McCarran-Ferguson Act specifically mandated remain free of federal interference. The position set forth herein is precisely the view presented by the United States Solicitor General in *Ward*. *See* Br. of United States as *Amicus Curiae* in *Ward*, No. 97-1868 (filed November 1998) at 22-25.

### C. ERISA's Legislative History Is Unequivocal In Disclosing That The Act Was Intended To Regulate Pension Benefits And Was Not Intended To Impact The Field Of Insurance.[16]

ERISA was the direct outgrowth of the explosion in private pension plans during the middle of the last century. The number of employees covered by such plans grew from approximately 4 million in 1940 to over 30 million by 1973.[17] The estimated assets held by such plans during this same period grew from $2.4 billion to $150 billion.[18] With this explosive growth came a similarly expansive growth in the abuses of such funds.[19] In

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[16] *See generally* Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1976) [hereinafter "Legislative History"]; Special Comm. on Aging, U.S. Senate, 98th Cong., The Employment Retirement Income Security Act of 1974: The First Decade 1-25 (Comm. Print 1984) [hereinafter "The First Decade"].

The legislative history discussed herein is carefully and extensively set forth in greater detail in Bogan, *Protecting Patient Rights, supra*, 74 Tul. L. Rev. 951; *See also* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. Pitt. L. Rev. 427, 437-457 (1987).

[17] *See* S. Rep. No. 93-127, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4839-40, and in 1 Legislative History, *supra* note 16, at 589.

[18] *See* H.R. Rep. No. 93-533, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4641, and in 2 Legislative History, *supra* note 16, at 2350; The First Decade, *supra* note 16, at 5; James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 24 (1978).

[19] *See* 120 Cong. Rec. 29,934 (1974), *reprinted in* 3 Legislative History, *supra* note 16, at 4748 (remarks of Sen. Javits); The First Decade, *supra* note 16, at 6 n.22 (citing congressional hearings on abuse in pension plan administrations); *see also* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in*



addition, the enormous accumulation of such funds exerted a major impact on the country's financial markets.[20] This explosion occurred without the benefit of any effective federal or state regulation.[21]

In 1954, at the request of President Eisenhower, Congress undertook an extensive study of the private pension industry.[22] This study disclosed abuses, including incompetent management of pension funds, looting, embezzlement, kickbacks, excessive administration costs and imprudent investment practices.[23] In response, Congress enacted the Welfare and Pension Plans Disclosure Act ("WPPDA") in 1958.[24] This law merely required the disclosure of certain financial information to the employees and did not provide any meaningful regulation of the funds themselves.[25]

This legislation was wholly ineffective.[26] Consequently, in 1962 President Kennedy appointed a special

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*Effective Federalism, supra* note 16, at 443-45 (referring to the many abuses in employee pension plans listed in ERISA's legislative history).

[20] *Id.*; H.R. Rep. No. 93-533, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4641, and in 2 Legislative History, *supra* note 16, at 2350.

[21] *See* note 17 *supra*.

[22] *See* S. Rep. No. 85-1440, at 2-11 (1958), *reprinted in* 1958 U.S.C.C.A.N. at 4137.

[23] *Id.* at 4137-47.

[24] Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974).

[25] *See* H.R. Rep. No. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, and in 2 Legislative History, *supra* note 16, at 2351; *Malone v. White Motor Corp.*, 435 U.S. 497, 507 (1978) (plurality opinion).

[26] *See* S. Rep. No. 93-127, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4841, and in 1 Legislative History, *supra* note 16, at 590; H.R. Rep. No. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, and in 2 Legislative History, *supra* note 16, at 2351.

task force to study the problem.[27] The task force concluded that further federal regulation of private pension plans to include mandatory minimum vesting and funding requirements was necessary and that further study was required on other issues.[28] Significantly, the task force specifically did not investigate or consider any reforms of nonpension plans, such as health insurance plans.[29] In response to these concerns, New York Senator Jacob Javits introduced legislation in 1967 to create federal funding and participation requirements for private pension plans.[30] This lead to further Congressional

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[27] *See* President's Comm. on Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans, at vii-viii (1965) [hereinafter "President's Committee Report"]; *see also* The First Decade, *supra* note 16, at 8-10 (describing the formation of the committee and its findings).

[28] *Id.*

[29] *See* President's Committee Report, *supra* note 27, at iv ("Although the area of investigation assigned to the Committee included welfare plans as well as retirement programs, the President's memorandum specifically raised questions about issues which arise primarily from retirement plans. Other types of welfare plans, such as health and insurance plans, make important contributions to the economic security of American workers; they do not, however, have the impact of pension plans on accumulation of savings, labor mobility, and similar matters touched upon by the President. Consequently, the Committee has confined its efforts to an inquiry into private employee retirement plans (i.e., excluding plans for self-employed persons) without any extensive study of other types of welfare plans.").

[30] *See* 113 Cong. Rec. 4650-53 (1967) (remarks of Sen. Javits); *see also* 120 Cong. Rec. 29,933-34 (1974), *reprinted in* 3 Legislative History, *supra* note 16, at 4748 (remarks of Sen. Javits) (recounting his continued efforts to reform the private pension and welfare system).



investigations and eventually ERISA. In 1970, the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare began a three-year study "undertaken to ascertain the need for statutory protections for workers' pension programs and to formulate appropriate corrective legislation."[31]Like the previous investigations, the subcommittee's hearings disclosed a morass of abusive practices resulting in the loss of retirement benefits to employees as the result of inadequate funding, mismanagement and unreasonable vesting requirements.[32] It agreed with President Kennedy's task force and recommended comprehensive regulation of the pension industry.[33] Shortly thereafter, Senator Javits introduced Senate Bill 4. It stated, "[t]he purpose of S.4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems which have been determined by the Senate Subcommittee's comprehensive study of such plans."[34] A corresponding House bill was also introduced.[35]

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[31] *See* S. Rep. No. 92-634, at 1 (1972); *see also* 119 Cong. Rec. 30,003 (1973), *reprinted in* 2 Legislative History, *supra* note 16, at 1598 (statement of Sen. Williams).

[32] *See* H.R. Rep. No. 93-533, at 5-8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643-46, and in 2 Legislative History, *supra* note 16, at 2355.

[33] *See* 120 Cong. Rec. 29,935-44 (1974), *reprinted in* 3 Legislative History, *supra* note 16, at 4748 (remarks of Sen. Javits).

[34] S. 4, 93d Cong. (1973); *see* S. Rep. No. 93-127 (1973), at 1, *reprinted in* 1974 U.S.C.C.A.N. 4838, and in 1 Legislative History, *supra* note 16, at 587.

[35] *See* H.R. 2, 93d Cong. (1973), *reprinted in* 1 Legislative History, *supra* note 16, at 3.

These bills were sent to their appropriate committees, which issued their own reports. Each of these reports concerned themselves solely with abuses in, and the consequent need for, regulation of private pension plans.[36] The Senate Committee on Labor and Public Welfare report states:

> The provisions of S.4 are addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives. It responds by mandating protective measures and prescribing minimum standards for promised benefits. The purpose of S.4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems. . . .[37]

The report states that "[t]he principal issues affecting the vital and basic needs for legislative reform involve consideration of the essential elements of pensions: (1) "vesting," (2) "funding," (3) "reinsurance," (4) "portability" and (5) "fiduciary responsibility and disclosure."[38] Similarly, the House Committee on Education and Labor report states that the "primary purpose of the bill is the protection of individual pension rights" and

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[36] *See* S. Rep. No. 93-127, at 1-36, *reprinted in* 1974 U.S.C.C.A.N. at 4838-89, and in 1 Legislative History, *supra* note 16, at 587-622; H.R. Rep. No. 93-533, at 1-28, *reprinted in* 1974 U.S.C.C.A.N. at 4639-70, and in 2 Legislative History, *supra* note 16, at 2348-75; 120 Cong. Rec. 29,933-35 (1974), *reprinted in* 3 Legislative History, *supra* note 16, at 4746-51 (remarks of Sen. Javits).

[37] S. Rep. No. 93-127, at 1, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 Legislative History, *supra* note 16, at 587.

[38] S. Rep. No. 93-127, at 8-11, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 Legislative History, *supra* note 16, at 594-97 (emphasis omitted).



that the legislation was designed to: (1) establish minimum fiduciary standards for retirement plans, (2) provide for enforcement and public disclosure of finances, (3) improve the equitable character and soundness of private pension plans by requiring (a) appropriate vesting and (b) minimum funding standards, and (4) guarantee the adequacy of the plan's assets prior to termination.[39]

ERISA's legislative history is unequivocal that it was intended as a pension reform bill. In describing ERISA, Senator Javits said, "[T]he pension reform bill is the greatest development in the life of the American worker since social security. For the first time in our history most workers will be able to truly retire at retirement age and live decently on their social security and private pensions."[40] Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, described his committee's study which lead to ERISA. "This study clearly established that too many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized."[41] In the House, one of the principal proponents, Representative Dent, described ERISA's purpose in this way: "[W]e started out with only one aim in view and that was to give a pension participant his entitlements under the

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[39] H.R. Rep. No. 93-533, at 1, 17-18, *reprinted in* 1974 U.S.C.C.A.N. at 4655-56, and in 2 Legislative History, *supra* note 16, at 2348, 2364-65.

[40] 3 Legislative History, *supra* note 16, at 4747 (remarks of Sen. Javits).

[41] 3 Legislative History, *supra* note 16, at 4733 (remarks of Sen. Williams).

contract of the pension plan he belonged to."[42] The record repeatedly references tragic examples of workers deprived of pension benefits after 30, 40 and 50 years of employment because they were a few days short of vesting before retiring, the company was sold or went bankrupt, or because the employer could not afford to pay the promised retirement benefits.[43]

While this Court has referred to ERISA as a "comprehensive and reticulated statute,"[44] it is so only with respect to pension plans, and the Court's description of the Act as such a statute originated in the context of pension cases.[45] The Act substantially regulated pension plans but contained virtually no meaningful regulation of insurers or insurance "plans."

What is clear from this long and extensive legislative history and the statute itself is that the exclusive concern of Congress in passing ERISA was to address abuses in the pension field. "ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989). Not a single insurance concern is expressed anywhere in the legislative history.

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[42] 3 Legislative History, *supra* note 16, at 4665 (remarks of Rep. Dent).

[43] *See, e.g.*, 3 Legislative History *supra* note 16, at 4749-50 (remarks of Sen. Javits on "Why Pension Reform Is Needed"), (4791-96) (remarks of Sen. Bentson), (4664-65) (remarks of Rep. Thompson), (4710) (remarks of Rep. McClory); *Interim Report of Activities of the Private Welfare and Pension Plan Study, Subcommittee on Labor of the Committee on Labor and Public Welfare*, S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972) at 67-90.

[44] *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

[45] *Id.*



Instead, Congress expressly saved all insurance regulation to the States. This Court has endorsed this view, noting that the broad preemption clause was added at the last minute, that there is no legislative history discussing the relationship between the saving clause and the general preemption clause, and that there is a "complete absence of evidence" to support a narrow reading of the saving clause. *Metropolitan Life*, 471 U.S. at 745-46 n.21. As one commentator who has extensively reviewed ERISA's legislative history reports:

> . . . ERISA's legislative history is remarkable . . . for what it does not contain. ERISA's legislative history provides no evidence that Congress seriously investigated, studied, or debated any issues or concerns with nonpension employee benefit plans.
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> There is no documentation anywhere in ERISA's legislative history of any study or investigation of the history or growth of nonpension benefit plans, or of any specific concern with the management of nonpension plan assets. Further, ERISA's legislative history fails to disclose any concerted investigation of any complaints about nonpension benefits, such as inadequate health care, accident, death or disability coverage, or problems with health, life, or disability benefits claims. In short, Congress just was not dealing with nonpension benefit plans when it enacted ERISA.

Bogan, *Protecting Patient Rights*, *supra*, at 972, 976-77.

### D. This Court Has Recognized That Remedial Laws Are At The Core Of The McCarran-Ferguson Act And Thus The Saving Clause.

This Court has repeatedly made clear that insurance enforcement mechanisms and laws regulating claims

practices are at the core of McCarran-Ferguson and thus ERISA's saving clause.

> Congress was concerned [in the McCarran-Ferguson Act] with the type of state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, its interpretation, *and enforcement* – these were the core of the "business of insurance." [T]he focus [of the statutory term] was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) (emphasis added).

*Metropolitan Life*, 471 U.S. at 744 (emphasis added). *Accord Ward*, 526 U.S. at 374 n.5 (stating that "laws regulating claims practices . . . [are included] in catalogue of state laws that regulate insurance.").

That state remedial statutes are squarely protected by McCarran-Ferguson was underscored again in *Humana*, 525 U.S. 299. Therein, insureds under certain health insurance contracts brought suit under RICO claiming that the insurers were secretly obtaining kickbacks from hospitals in violation of the health insurance agreements. The applicable Nevada state laws permitted the insured to sue the insurer in tort for violation of the covenant of good faith and fair dealing and for violation of the state's Unfair Insurance Practices Act. 525 U.S. at 312. The insurers sought to prevent the application of the federal RICO claim on the grounds that McCarran-Ferguson precluded the application of federal law in the face of these state-law remedies. This Court found that the RICO claim did not impair the state laws and therefore was not barred by McCarran-Ferguson.



Most significant is the fact that this Court less than three years ago specifically considered Nevada's state insurance remedies to be protected by McCarran-Ferguson. Indeed, the conclusion was apparently so obvious to this unanimous Court that its opinion reveals no inquiry or analysis as to whether the state insurance remedial laws were covered by McCarran-Ferguson.

Of even greater significance is that *Humana* appears to be directly at odds with *Pilot Life's* holding that the Mississippi insurance bad faith law at issue there was not within the scope of McCarran-Ferguson and thus ERISA's saving clause. Indeed, the Nevada insurance bad faith law appears to be indistinguishable from the Mississippi law at issue in *Pilot Life*. In *Pilot Life*, the Court concluded that the State bad faith law did not fall within the ambit of the McCarran-Ferguson Act. Yet, in *Humana*, the Court appears to have assumed it obvious that the identical Nevada law did.

*Humana* is significant for another reason. Petitioners claim that any law which provides a remedy other than those set forth in ERISA's Section 502 is necessarily in conflict with Section 502 and therefore preempted by principles of conflict preemption. Yet, under federal conflict analysis, preemption only occurs where it is impossible to comply with both state and federal law or where the state law stands as an obstacle to the accomplishments of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Simply because a State may have an insurance remedy which may be either an alternative to the ERISA remedies or a supplement to them does not mean that it is either impossible to comply with both state and federal law or that the state law stands as an obstacle to the accomplishments of ERISA. As noted in *Humana*, Nevada has a "comprehensive administrative" scheme that prohibits various forms of insurance fraud and misrepresentations. RICO provides a different remedy. Nonetheless, the RICO

claims "complemented" the Nevada administrative regime and thus did not impair its laws. *Humana*, 525 U.S. at 313. The same can be said of the law in question here.[46] ERISA was intended to protect employee benefits. State insurance laws which further that goal, do not frustrate or impair ERISA. The fact that a remedy in addition to those set forth in ERISA is available to Moran enhances ERISA's basic purpose through an appropriate application of the saving clause.

### E. ERISA's Enforcement Mechanisms Leave Insureds With No Effective Remedy And Do Not Conform With ERISA's Legislative History; Petitioner Is Not A Proper Party To An ERISA Action.

Strong evidence that ERISA was not intended to preempt state insurance enforcement actions is the fact that ERISA's remedies were drafted with pension plans in mind and are not suited to insurance claims. ERISA was intended to remedy abuses rampant in the administration of *funds*, which were held for the benefit of employees, *Morash*, 490 U.S. at 112-113, and thus ERISA only provides a remedy against the plan itself. In most insurance instances, however, there is no "fund," only a group insurance policy issued to an employer or employee organization insuring the employees, funded by premiums paid directly by the employer, employees or both to the

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[46] An insured may proceed to collect benefits pursuant to a Section 502 claim and seek additional appropriate relief by proceeding under a state law which is directed solely at the insurance industry, such as the Nevada bad faith claim or the claims referenced in note 3, *supra*. Rather than conflicting with ERISA, such state actions are entirely consistent with and complement ERISA's intent to protect employees by encouraging the prompt and fair payment of claims.



insurer.[47] The disputes in this context are fundamentally between the insured/employees and a third party, the insurer.

Strikingly, ERISA provides no effective remedy for an insured to obtain insurance benefits wrongfully denied. ERISA permits an insured to bring a civil action to recover benefits due. 29 U.S.C. § 1132(a)(1)(B). However, it does not permit a suit against the insurer, which owes the benefits. "ERISA permits suits to recover benefits only against the Plan as an entity." *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985); *Garratt v. Knowles*, 245 F.3d 941, 949 (7th Cir. 2001). "An employee benefit plan may sue or be sued . . . as an entity." 29 U.S.C. § 1132(d)(1). "Any money judgment . . . against an employee benefit plan shall be enforceable *only against the plan* as an entity and shall not be enforceable against any other person. . . . " 29 U.S.C. § 1132(d)(2) (emphasis added).

Because of this, courts have repeatedly held insurers are not proper parties to an action under ERISA and have repeatedly dismissed actions filed against insurers. *See, e.g., Gibson v. Prudential Ins. Co. of N. Am.*, 915 F.2d 414, 417 (9th Cir. 1990); *Everhart v. Allmerica Financial Life Ins. Co.*, 1999 WL 498244 (N.D. Cal. 1999); *Roeder v. Chemrex, Inc.*, 863 F.Supp. 817, 828 (E.D. Wis. 1994); *Cohen v. Equitable Life Assurance Soc. of the United States*, 196 Cal.App.3d 669, 672-73 (1987).[48] This, coupled with the Court's holding in *Pilot Life*, has had the effect of granting insurers a

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[47] The exception is the instance of a self-funded plan, which is encompassed within ERISA and which is not typically regulated comprehensively by the States.

[48] Some courts have held, without statutory authority, that the administrator who controls the plan may be sued. *See, e.g., Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997); *Rosen v. TRW, Inc.*, 979 F.2d 191, 193 (11th Cir. 1992). In any event, insurers generally are not administrators as defined by ERISA. 29 U.S.C. § 1002(16)(A)(i).

broad-based immunity, a result wholly unintended under ERISA. ERISA, a law enacted to protect employees, has thus been turned on its head to deny any meaningful relief against insurance industry abuses, a tragic result that numerous courts have decried.[49]

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[49] *See Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1005 (9th Cir. 1998) *cert. denied*, 120 S.Ct. 170 (1999) ("Although this case presents a tragic set of facts, the district court properly concluded that under existing law the Basts are left without a remedy"); *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1271 (10th Cir. 1996) ("Although moved by the tragic circumstances of this case and the seemingly needless loss of life that resulted, we conclude the law gives us no choice but to affirm [the grant of summary judgment to the insurer]"); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1338 (5th Cir. 1992) ("The result ERISA compels us to reach means the Corcorans have no remedy, state or federal, for what may have been a serious mistake"); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49, 52-53 (D. Mass. 1997) ("The tragic events set forth in Diane Andrews-Clarke's Complaint cry out for relief. . . . Under traditional notions of justice, the harms alleged . . . should entitle [her] to some legal remedy. . . . Nevertheless, this Court had no choice but to pluck [her] case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers . . . , to slam the courthouse doors in her face and leave her without any remedy.") (footnotes omitted); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross & Blue Shield*, 832 F.Supp. 1456, 1457 (N.D. Ala. 1993), *aff'd*, 41 F.3d 1476 (11th Cir. 1995); *Jordan v. Reliable Life Ins. Co.*, 694 F.Supp. 822, 827 (N.D. Ala. 1988); *see also* Bogan, *Protecting Patient Rights*, *supra* note 5, at 996-1002; Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 Harvard J. on Legis. 35, 38 (1996) ("It is a rich irony that ERISA, which was heralded at its enactment as significant federal protective legislation, has through its preemption provision been the basis for invalidating scores of progressive state laws.") (footnote omitted).



Thus, if Moran's state-law claim is preempted, petitioner is not a proper party to this ERISA action. While this result seems illogical, it is what ERISA would require. If Moran is precluded from asserting her state claim against petitioner, Moran's only permissible action under ERISA would be against her ERISA plan, not the insurer or HMO. It would be far more reasonable to believe that Congress intended to permit her to proceed against the insurer pursuant to the saved Illinois law than require her to proceed under Section 502 against the plan.

An action against a "plan" makes sense where the plan consists of a fund out of which benefits are paid, as in a pension plan or self-funded insurance, and it was these plans that concerned Congress when it passed ERISA. Yet, there is no such funded "plan" in existence with regard to insurance policies. In fact, the "plan" in many instances does not really exist at all, but is a fictional entity created under ERISA. Indeed, the "plan" often is nothing more than a group insurance policy issued to an employer and insuring the employees.[50] The "plan" itself has no bank account, no assets, no address, no office, no employees and no trustees. And while there are a few regulations applying to such plans, in many instances these regulations merely require financial reporting, which is meaningless in the case of an insurance plan, and there is often no one to comply with these regulations.[51]

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[50] *See, e.g., Gaylor v. John Hancock Mutual Life Ins. Co.*, 112 F.3d 460, 463-65 (10th Cir. 1970); *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 1213-15 (11th Cir. 1999); *Marshall v. Bankers Life & Cas. Co.*, 2 Cal. 4th 1045, 1054, 832 P.2d 573 (1992).

[51] Indeed, the department of labor regulations do not even require such reporting if the plan has fewer than 100 participants. 29 C.F.R. §§ 2520.104-20, 2520.104-21. Moreover, even if all of the regulations are ignored, a plan will be deemed to exist anyway. *See Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984).

Further, the statutory history of the preemption clause itself confirms that ERISA was intended to apply to funds and not to comprehensively regulate private insurance arrangements. As noted above, the preemption clause was significantly broadened during the House/Senate conference committee. Yet, while simultaneously broadening the preemption clause, it also included the deemer clause,[52] which preserved ERISA's preemption for self-funded plans.[53] In light of the saving clause, this created a clear distinction in ERISA's impact on self-funded insurance arrangements as opposed to private insurance arrangements.[54] The former were swept into ERISA's broad preemption provision, the latter were specifically excluded.

United Policyholders respectfully submits that many of the problems arising out of ERISA insurance claims stem from this Court's decision in *Pilot Life*. United Policyholders submits that the Court should re-examine its holding in *Pilot Life*. In light of (1) ERISA's clear purpose to regulate pension and not insurance difficulties, (2) the saving clause, which saves "any" laws regulating insurance and (3) the complete unsuitability of ERISA's remedies to insurance claims, we believe Congress intended to save from preemption *all* state laws which would have the effect of regulating the conduct of insurers. This would include such basic claims as breach of contract, fraud and certainly insurance bad faith, to the extent they are exercised to enforce claims against insurers or to define impermissible conduct by insurers. United Policyholders submits that Congress never intended to deprive an insured of her basic right to sue

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[52] 29 U.S.C. § 1144(b)(2)(B).

[53] H.R. Rep. No. 93-1280, 93rd Cong. 2d Sess. at 383, *reprinted in* 3 Legislative History, *supra* note 16, at 4650.

[54] *See Metropolitan Life*, 471 U.S. 724, 747.



an insurer for breach of contact, to deprive her of her basic right of a jury trial, and to preclude the insured from pursuing the basic right to sue the insurer for benefits wrongfully denied, only to replace it with a remedy which effectively permits an insurer to deny a claim as long as it does not do so in an arbitrary and capricious fashion. It is hard to imagine why Congress would have intended (but not stated in the statute) that traditional state insurance remedies forged by the States to address the specific issues of insurance enforcement be replaced with remedies completely unsuitable to the resolution of insurance disputes.[55] It is a particularly difficult leap of faith in light of the complete absence of legislative history to support such a conclusion and the explicit terms to the contrary of the saving clause itself.

At the end of his dissent in the Seventh Circuit opinion, Justice Posner writes of the inconsistency of the majority opinion. He argues that a law cannot be both written into an insurance contract and an ERISA plan. The answer, however, is not to preempt the Illinois law, but to apply the saving clause and permit the state-law claim to survive on its own.

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[55] An example can serve to illustrate the absurdity of the ERISA remedy. Suppose an individual becomes disabled while insured under a group disability policy issued to his employer and within the scope of ERISA. The evidence of the disability "plan" is the group policy itself and perhaps the booklet explaining coverage delivered to him by his employer. Benefits are paid and shortly thereafter the employer goes out of business. Five years later the insurer wrongfully terminates benefits. The insured would have to file suit against the "long term disability plan" (a non-existent entity) of a non-existent employer. No action would lie against the insurer, which owes the benefits.

## II. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION.

This action was originally filed in the State court of Illinois and removed to federal court. The Court of Appeals found jurisdiction to be proper, concluding that Moran's claim should properly be considered as one arising under Section 502 and that Section 4-10 of the Illinois law should be applied in the context of a claim for ERISA benefits. As such, the Court found that she had no separate state claims and thus, the doctrine of complete preemption permitted removal.

United Policyholders submits this was incorrect. Moran's claim against petitioner was not preempted. She was entitled to proceed under state law directly against petitioner. Because her claims are not completely preempted, the well-pleaded complaint rule precludes removal, notwithstanding petitioner's claim of a federal defense. *Franchise Tax Bd.*, 463 U.S. at 10-11.

## CONCLUSION

ERISA's statutory history as pension reform legislation is unequivocal. Its language saving any state law regulating insurance is unambiguous and, because ERISA was not intended to regulate insurance, it fails to provide a meaningful remedy to resolve insurance disputes. Under this Court's long-established principles of statutory construction, Moran's claim should be returned to the Illinois State court, where she may pursue her Section 4-10 claim against petitioner directly.

Respectfully Submitted,

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